Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

COUNTY VANLINES, INC., PETITIONER

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,
ALSO KNOWN AS EXPERIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court in its definitive and comprehensive development of the law of defamation, from its decision in the New York Times v Sullivan case through the case of Gertz v *Robert Welch, Inc.*, where in *Gertz* this Court ultimately directed each and every State to set its own standard of requirements for a private defamation plaintiff "based on some form of fault" and in response to the directive of *Gertz*, New York State, by its Court of Last Resort, set the Chapadeau standard as New York's standard for measuring liability in a private defamation plaintiff case.

I. Does the decision below which excuses a credit reporting agency for continuing to use a flawed database to report on the creditworthiness of the petitioner despite being alerted to the problem based on inapplicable and inappropriate subjective standards, conflict with this Court's decisions in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323(1974), *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749(1985), and the decisional law of New York establishing the standard of liability for defamation?

II. Does a credit reporting agency, once alerted that its computer database has confused the petitioner with another entity in its report about the petitioner's creditworthiness, commit actionable defamation when, despite this alert, it continues to confuse these two entities in its computer database so that its inaccurate data leads unfairly to the denial of an extension of credit for the petitioner?

III. Was the petitioner deprived of due process of law by the lower courts' resort to a subjective standard of

liability—at odds with the *objective* standard required under New York law in the wake of *Gertz*---- in order to conclude that no genuine issue of material fact existed for trial concerning whether the respondent "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties?"

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6, Petitioner, through undersigned counsel, states that there is no parent corporation related to it, and that no publicly held company owns 10% or more of its stock.

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The unpublished opinion of the Court of Appeals for the Second Circuit in County Vanlines, Inc. v. Experian Information Solutions, Inc., C.A. No. 04-2982-cv, decided and filed November 22, 2005, affirming the District Court's order granting the Respondent's cross motion for summary judgment, is set forth in the Appendix hereto(App. 1-5).

The published Memorandum and Order of the United States District Court for the Southern District of New York, White Plains Division, in County Vanlines, Inc. v. Experian Information Solutions, Inc., 317 F. Supp. 2d 383(S.D.N.Y. 2004), Civil Action No. 01-07075), dated April 30, 2004, granting the Respondent's cross motion for summary judgment, is set forth in the Appendix hereto(App. 6-33).

The unpublished Order of the United States Court of Appeals for the Second Circuit in County Vanlines, Inc. v. Experian Information Solutions, Inc., C.A. No. 04-2982-cv, dated March 31, 2006, denying the petitioner's timely filed petition for rehearing, is set forth in the Appendix hereto(App. 34-35).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit affirming the District Court's order granting the Respondent's cross motion for summary judgment, was entered on November 22, 2005; and its Order denying the petitioner's timely filed petition for rehearing was filed and dated March 31, 2006(App.1;34).

This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of the petitioner's timely filed petition for rehearing. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

STATEMENT

The Petitioner, County Vanlines, Inc. ("the petitioner"), is a national moving company located in Yonkers, New York. It was formed in August of 1996 by its President Frank Lucchesi who has more than 40 years of service in the moving industry. The respondent Experian Information Solutions, Inc. ("the respondent"), is a credit reporting agency which supplies the banking industry, among others, with credit information about anyone in its database system.

In March and April of 2001, the Petitioner applied for a loan with the Bank Of New York (BONY) in order to finance its purchase of a trailer. In the wake of BONY's rejection of its application for credit, the petitioner requested the respondent to send it an exact copy of the credit report it sent to the BONY incident to its request for an extension of credit. The respondent

sent petitioner a copy of its credit report of April 16, 2001, one which contained more than 20 errors including, among other things, confusing the petitioner with another moving company called "County Van and Storage Co., Inc.,"of Delaware. This Delaware moving company became defunct and discontinued business almost 5 years earlier in 1996, listing debts, liens and judgments for periods of time that were prior even to the incorporation of the petitioner. In addition, the respondent's credit report about the petitioner contained blatantly contradictory data which were clearly false and libelous on their face. This particular report furnished the basis for the petitioner's complaint which commenced this civil action against the respondent.

In fact, the respondent had issued a similar credit report about the petitioner three years earlier in December of 1998 when the petitioner sought an extension of credit from Fleet Bank and was likewise rejected. The file number in 1998 for the defunct business was the same as the file number used in the 2001 linked report. In 1998, the petitioner immediately brought this erroneous information to the respondent's attention and it demanded that the respondent correct its database and delete this erroneous information about the petitioner and its confusion with "County Van and Storage Co., Inc.,"of Delaware.

On April 5, 2001, the respondent issued a third credit report, a personal credit report on the petitioner's President, Mr. Lucchesi. Besides addressing his personal creditworthiness, it attached the financial report of his business, purportedly the petitioner moving company. However, instead of

attaching the petitioner's financial report, this report attached a report on the defunct business "County Van and Storage Co., Inc.,"of Delaware; and its clear and unmistakable inference was that this business---- defunct since 1996---- was, in fact, the ongoing business of the petitioner's President.

In the face of the petitioner's claims below for compensatory as well as punitive damages as a result of this commercial defamation, the respondent first claimed truth in its answer and then upon the parties' cross motions for summary judgment argued that there was insufficient evidence adduced through discovery that the errors in the reports were more mere mistakes and not done with malice so as to overcome the New York qualified privilege afforded to credit reporting agencies in disseminating information about persons in its database.

The respondent offered only one piece of evidence that is relevant to this petition, an affidavit from its employee (Mr. Poteraj) who had extensive knowledge of the software that drives the respondent's computer system. In his affidavit, Mr. Poteraj stated that the respondent owns and operates a very expensive and very profound computer system with extensive matching abilities; but he admitted that it makes mistakes. Yet respondent sought a qualified privilege to protect it against the damages caused by these mistakes because the computer was so expensive and has such matching skills that the errors, while predictable, were merely innocent "mistakes" not rising to the level of gross negligence or malice.

Mr. Poteraj also averred that respondent produces 40,000,000 reports a month, or 480,000,000 reports a year, and that the computer system cannot be 100% perfect. Thus if the computer is only 99% correct, there could be 4,800,000 lives and businesses affected by those "mere mistakes" and that surely brings the matter "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," part of the standard set out by the New York state courts in Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E. 2d 569, 571(C.A.N.Y. 1975), in the aftermath of this Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-348(1974).

The petitioner brought this defamation case in the New York Supreme Court and the respondent removed the case to the District Court of the Southern District of New York on grounds of diversity of citizenship. Both parties agreed to a jury trial and that New York law applies. The District Court decided the facts instead of determining whether there were issues of fact for trial and then proceeded to set subjective standards to measure malice at law, ignoring completely the Gertz and Chapadeau decisional law(App. 6-33). It granted the respondent's cross motion for summary judgment ruling that on the facts as it found them to be, the respondent was entitled to a qualified privilege in disseminating information about persons in its database(Id.).

Petitioner then appealed this decision to the Court of Appeals for the Second Circuit which affirmed the District Court's and held that the subjective standards of "ill will" and state of mind beliefs as

applied to the facts of this case(App. 1-5). It cited the same cases as the District Court. Both the District Court and the Court of Appeals did not address the Chapadeau standard and both courts ruled as if the decisions in both Gertz and Chapadeau did not exist(Id.). The Circuit Court of Appeals subsequently denied a petition for rehearing filed by the petitioner(App. 34).

REASONS FOR GRANTING THE PETITION

1. The Decision Below Conflicts With This Court's Decisions in Gertz v. Robert Welch, Inc., 418 U.S. 323(1974) and *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749(1985).

This nation lives by its legislatively and judicially created laws. Once this Court publishes a decision, it becomes under the law of the land which every judge must apply whether he or she agrees with the decision or not. In Gertz, a monthly publication for the John Birch Society in its articles by a regular contributor sought to discredit an attorney who on behalf of the victim's family had prosecuted a civil action for damages against the police officer who had wrongly shot and killed the victim. 418 U.S. at 325-326. After these articles were discovered to contain many "serious" inaccuracies about the lawyer's background and training, explicitly stating in one article that he was a "Communist-fronter," the lawyer sued the publisher for libel. *Id.* at 326-327. The publisher moved for summary judgment because the lawyer was a public person and under this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254(1964), it was privileged to publish this information since it was not accompanied

by "actual malice." *Id.* at 327-328. Summary judgment was denied but after a jury trial awarding the lawyer $50,000, the District Court granted a judgment to the publisher notwithstanding the verdict because the content of its articles addressed issues of public interest and regardless of the status of the person defamed, invoked the New York Times's privilege. *Id.* at 329.

The court of appeals affirmed the ruling because that there was no evidence of "actual malice" under New York Times since the publisher's managing editor did not know that many accusations written by the publication's regular contributor were false; in fact he knew nothing about the lawyer except what he read in the articles. *Id.* at 331-332.

In reversing the court of appeals, a plurality of this Court in an opinion authored by Justice Powell, reframed the issue as to whether after New York Times a publisher of information who disseminates a defamatory falsehood about a person who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. *Id.* at 332. After balancing the need for a private individual to have some remedy for defamatory falsehoods while protecting the First Amendment right of publishers to disseminate information about issues of public interest, the Gertz Court forged a new rule for these situations: that such private plaintiffs should have a remedy for defamation on a less demanding showing than that required by New York Times and that the various States "should retain substantial latitude" in developing this remedy. *Id.* at 345-350. However; there could be no liability without fault; "that, so long as they do not impose

liability without fault, the States my define for themselves the appropriate standard of liability". *Id.*

In *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E. 2d 569, 571(1975), the Court of Appeals of New York followed Gertz's directive and set out the standard of proof for a private person seeking to recover damages for defama ion from a publisher in New York in the course of its dissemination of information about issues of public interest:

> [w]e now hold that within the limits imposed by the Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover...[if he establishes] by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties.

Id.(emphasis supplied). Applying those principles, the court in Chapadeau held that a newspaper was entitled to summary judgment in a suit for defamation brought against it by a public school teacher in the wake of the paper's article about him being arrested with a hypodermic needle and heroin where it was shown that his arrest was within the scope of legitimate public concern and where the two inaccuracies were not so important and sufficiently reviewed as to raise the inference of "grossly irresponsible conduct." *Id.*

Subsequently, in *Dun and Bradstreet Inc., v. Greenmoss Builders*, 472 U.S. 749(1985), this Court, writing again through Justice Powell for its plurality, had the opportunity to decide a controversy virtually identical to this case. The credit report there, as here, "was false and grossly misrepresented respondent's [Greenmoss's] assets and liabilities." *Id.* at 751.The question presented was "whether the rule of *Gertz* [about a diluted standard of proof but with a ban on the award of presumed and punitive damages] applies when the false and defamatory statements do not involve matters of public concern."

The *Greenmoss* Court responded in the negative and observed:

> To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression....

Id. at 757. Finding no "core" First Amendment values in the dissemination of this kind of purely economic information to a limited number of recipients who by agreement cannot further disseminate it themselves, the Court concluded that *Gertz's* limitations on a private citizen's remedy for defamation of matter having public concern do not apply when a credit reporting agency wrongfully issues false information about a person's creditworthiness based upon erroneous data. Id. at 760-761.

As the *Greenmoss* Court concluded, "the petitioner's credit report concerns no public issue....It was speech solely in the individual interest of the speaker and its specific business audience. *Cf. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561(1980). This particular interest warrants no special protection when--as in this case--the speech is wholly false and clearly damaging to the victim's business reputation. *Cf. id.*, at 566; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772,(1976)."

However, Justice Brennan, in a persuasive dissent, argued that the Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it contains economic matter or is in the economic interest of the speaker or the audience. *Id.* at 787. As he put it, "[s]peech about commercial or economic matters, even if not directly implicating 'the central meaning of the First Amendment,' [*New York Times v. Sullivan*,] 376 U.S. at 273, is an important part of our public discourse." *Id.* at 787-788 quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-103(1940). Thus he concluded that "[t]he credit reporting of Dun & Bradstreet falls within any reasonable definition of 'public concern' consistent with our precedents." *Id.* at 789. The combined sense of *Gertz*, *Greenmoss* and *Chapadeau*, then, is that where the State in the wake of *Gertz* has granted a credit reporting agency a qualified privilege to disseminate information about persons in its database, it converts its credit report into speech which is in the public interest, part of the public concern or otherwise non-private so that it can be treated as if it were a public media.

Thus in New York, where a conditional qualified privilege to credit reports is given, the single question then becomes what standard should be applied? The simple answer can only be the standard defined by the *Gertz* Court which held

> that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

418 U.S. at 347. This, in turn, implicates the *Chapadeau* standard, authorized by *Gertz* and later confirmed by *Greenmoss*, that the petitioner could recover for libel if it established by a preponderance of the evidence that the respondent acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties. 341 N.E. 2d at 571.

Instead of measuring the respondent's conduct against this standard which was enunciated in *Chapadeau*, authorized by *Gertz* and confirmed by *Greenmoss*, both courts below wrongly held that in order to recover, the petitioner had to show that the respondent had committed common law or constitutional malice in the process of keeping this wrong, outdated, obsolete and false information about the petitioner in its computer database despite being alerted three years earlier of this inaccurate and misleading information(App. 3;14-15). Moreover, in ruling that the petitioner had failed to make such a showing in order to avoid summary judgment, both courts embarked upon their own respective fact finding

missions to conclude from the summary judgment record----which should have been read in the light most favorable to the petitioner----that as a subjective matter, not an objective one, the respondent's refusal to correct the palpably false information it had in its computer database about the petitioner, especially confusing the petitioner with a financially irresponsible company which had been defunct since 1996,was not motivated by spite, ill will or recklessness tantamount to malice(App. 3-4).

Both *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) and *Liberman v. Gelstein*, 605 N.E.2d 344, 350(C.A.N.Y. 1992), decisions relied upon by the court of appeals, involved individuals against other individuals, so that the state of mind of one of the individuals could be determined. However in this case, it was impossible for petitioner to offer any evidence to show "spite or ill will" or a "high degree of awareness of its probable falsity"by the offending entity since only a mindless device, an outdated computer system containing obsolete and false information, was used by respondent in this case. Emotions, reasoning and state of mind could not logically be established. Here a mindless mechanical device which the respondent refused to update---even in the face of the petitioner's demand three years earlier---has produced erroneous reports and actionable libel under the *Chapadeau* standard that the respondent acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties.The appellate courts have held that you can't hide behind a computer. "The fact that the actual processing of the policy [in the case at bar, the processing of the credit report] was

carried out by an unimaginative mechanical device can have no effect on the company's responsibilities for those errors and oversights." *Bockhorst v. State Farm Mutual Ins. Co.*, 453 F.2d 533, 536(10th Cir.1972).

Even in *Anderson v. New York Tel. Co.*, 345 N.Y.S.2d 740 (App. Div. 1973), a case decided before *Gertz* and *Chapadeau*, the court held that in "light of the fact that: (1) the recordings appeared libelous on their face; (2) the source from which the recordings emanated was at best unknown to respondent and at worst of questionable reliability; and (3) the respondent made absolutely no attempt to verify the accuracy of any portion of the apparently libelous recordings, a jury question was raised by the plaintiff regarding the respondent's malice."A fortiori, after *Gertz* and *Chapadeau*, this same kind of proof, all of it present in this case, was suffcient to survive the respondent's summary judgment motion so that a jury could determine whether under *Chapadeau* the respondent acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties.

Under the *Chapadeau* standard, the issue would be reduced to the following: once the respondent's computer produced the false and libelous report, it becomes the responsibility of the respondent to verify the accuracy of the report prior to publication, and if under *Bockhorst supra*, that report was assumed to be known by a responsible person employed by the respondent, the jury could determine whether such employee acted with due "consideration for the standards of information gathering and dissemination

ordinarily followed by responsible parties."

If the respondent is relying upon the computer system to excuse its irresponsible behavior, then the issue of the adequacy of the computer's procedures should be a matter for the jury to decide. However, the petitioner submits that the summary judgment record is without any evidence to show that respondent attempted any research, review or investigation of the blatantly false defamatory reports so that this Court in its de novo review could not only reverse the decision below but also, applying New York law, hold that the respondent acted in a grossly irresponsible manner within the sense of *Chapadeau* and find for the petitioner on its motion to dismiss the respondent's defense of a qualified privilege.

For all of these reasons, the decision below conflicts with this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323(1974) and *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S.749(1985).

2. The Decision Below Decided An Important Federal Question In A Way That Conflicts With A Decision Of New York's Court of Last Resort.

By affirming the district court's decision based on the same subjective standards and citations which the motion judge employed, the court of appeals' decision conflicts with the State of New York's Court of Last Resort which held, in accordance with the directive in the *Gertz* case, that the standard for measuring a private defamation plaintiff's claim would be based on fault as set forth in *Chapadeau*, *i.e.*, whether the petitioner could show by a preponderance

of the evidence that a credit reporting agency such as the respondent acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties when despite an alert that its information about the petitioner was confusing, obsolete and false, it nonetheless refused to update its computer database to the detriment of the petitioner's good financial standing.

Even a different panel of the same court of appeals which rendered the decision below acknowledges that *the Chapadeau* standard of liability in New York applies to a libel suit by a private plaintiff against a non-media defendant about the statements the non-media defendant published concerning appraisals of property. *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 101-102 (2nd Cir. 2000).

The directive issued by this Court in Gertz while being a directive to the States, was a command upon the judiciary throughout this country. It was not up to the individual justice to decide if he or she will invoke the standard actually set by each State or to chose any other standard. It was the intent of the *Gertz* decision that once the State established the standard, then this standard would be the one single comprehensive standard which would be applied in every case when a privileged communication or person was involved. "Gertz...is now the law of the land, and until it is overruled, it must, under the principle of stare decisis, be applied by this Court." *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. at 764 (Burger, C.J., concurring). Certainly that means every court, including the court of appeals and the district court

below, so that its decisions were in harmony with *Chapadeau's* standard of proof for New York libel plaintiffs and the *Gertz* Court which authorized its formulation.

For these reasons, the decision below decided an important federal question of libel law in a way which conflicts with *Chapadeau*, a decision of the court of last resort for the State of New York, a decision which this Court itself authorized in *Gertz*.

3. The Petitioner Was Deprived Of Due Process Of Law By The Lower Courts' Resort To A Subjective Standard Of Liability—At Odds With The Objective Standard Required Under New York Law In The Wake Of *Gertz*---- In Order To Conclude That No Genuine Issue Of Material Fact Existed For Trial Concerning Whether The Respondent "Acted In A Grossly Irresponsible Manner Without Due Consideration For The Standards Of Information Gathering And Dissemination Ordinarily Followed By Responsible Parties."

The petitioner's cause of action is a valuable property right entitled to due process protection. *Los Angeles v. David*, 538 U.S. 715, 717(2003) (deprivation of money is the deprivation of property for purpose of evaluating a due process protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1885).

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official

action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The Mathews calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id. See Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004). *See also Wilkinson v. Austin*,___U.S.___, ___(6/13/05).

Employing the *Mathews* calculus to the circumstances of this case, the petitioner submits that the process due it below incident to the motion for summary judgment consisted of a fair reading of the summary judgment materials in the light most favorable to it, construing the parties' documentary presentation with every indulgence in its favor. See *Hamdi v. Rumsfeld*, 542 U.S. at 533 quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972); *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970). The District Court decided the facts instead of determining whether there were issues of fact for the jury to decide and then proceeded to set subjective standards to measure malice at law, ignoring completely the *Gertz* and *Chapadeau* decisional law(App. 6-33). It granted the respondent's cross motion for summary judgment ruling that on the facts as it found them to be, the respondent was entitled to a qualified privilege in disseminating information about persons in its database(*Id.*). The court of appeals then employed the same subjective standards of "ill will" and state-of-mind beliefs to the facts of this case as it also found them to be and affirmed the district court as if the decisions in *Gertz*

and *Chapadeau* did not exist.

This procedure whereby the petitioner was denied the right to a fair hearing on the facts deprived it of due process of law as established by the decisions of this Court and does not comport with the summary judgment procedure contemplated by Fed. R. Civ. P. 56.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit and ultimately to vacate that judgment and remand the matter to the District Court for trial on the merits of the petitioner's claim that the respondent defamed him, ordering that the respondent is not entitled in the circumstances to assert as a defense a qualified privilege afforded credit reporting agencies in disseminating information about the petitioner in its computer database; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 04-2982-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY VANLINES, INC.,
Plaintiff-Appellant,

-v.-

EXPERIAN INFORMATION SOLUTIONS, INC.,
also known as Experian,
Defendant-Appellee.

November 22, 2005, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For Plaintiff-Appellant: Bernard Rabin, Rabin and Rabin, Tarrytown, NY.

For Defendant-Appellee: Patrick G. Broderick, Jones Day, Reavis & Pogue, New York, NY.

JUDGES: PRESENT: HON. RALPH K. WINTER, HON. CHESTER J. STRAUB, HON. REENA RAGGI, Circuit Judges.

OPINION: SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the District Court is hereby AFFIRMED.

Plaintiff-Appellant County Vanlines, Inc. appeals from the April 30, 2004, order of the United States District Court for the Southern District of New York (William C. Conner, *Judge*) denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment. We assume familiarity with the facts and the procedural history.

County Vanlines, a moving and storage business owned by Frank Lucchesi, brought this defamation suit against Experian Information Solutions, Inc. ("Experian"), based on a 2001 credit report Experian issued to the Bank of New York ("BONY") in connection with a loan request County Vanlines made to the bank. Experian uses a computer system that stores business credit information and then, when a request comes in for a report about a particular business, searches for credit information that matches with identifying data for that business. To correct for name changes, misspellings, and the like, the system looks for close matches, with different data variables assigned different weights based on statistical analyses. When more than one business produces a close match, Experian provides the subscriber with multiple reports.

Experian's report to BONY linked County Vanlines' credit history with the history of another company, County Van & Storage, Inc., based on the similarity between the two names-apparently heightened because

Lucchesi erroneously listed his business's name as County Van Lines-and the common address and telephone number of the two companies.[1] Because County Van & Storage's credit history was poor, BONY denied County Vanlines' loan request. County Vanlines argues on appeal, as it did below, that Experian committed defamation by using a computer system that links companies based on close similarity of data rather than complete identity. County Vanlines also argues that Experian was on notice of a possible mix-up because, in 1998, Experian had provided a credit report on County Vanlines to Fleet Bank containing information for both companies (listed separately) as possible matches, and, after being denied a loan, County Vanlines had requested a reinvestigation and obtained from Experian a credit report omitting all mention of County Van & Storage.

We affirm the District Court's grant of summary judgment for substantially the reasons stated by the District Court. *See County Vanlines, Inc. v. Experian Information Solutions, Inc.*, 317 F. Supp. 2d 383 (S.D.N.Y. 2004). It is undisputed that credit reporters enjoy qualified immunity from defamation actions and that therefore County Vanlines would need to show common-law or constitutional malice to prevail. *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957). Upon reviewing the record and the parties' submissions,[2] we find that County Vanlines does not come close to establishing either type. The common-law malice standard requires that a statement be motivated by "spite or ill will," *see Liberman v. Gelstein*, 80 N.Y.2d 429, 439, 590 N.Y.S.2d 857, 863, 605 N.E.2d 344, 350 (1992), and County Vanlines has provided no evidence of such.

Nor has County Vanlines produced any evidence that Experian issued its report recklessly, *i.e.*, "with [a] high degree of awareness of [its] probable falsity," so as to meet the constitutional malice standard. *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). The nature of Experian's matching system carries-at most-a small risk of error, not a probability, and an incident from more than two years earlier that may or may not have revealed any error on Experian's part does not render Experian's actions in 2001 reckless. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) (to establish constitutional malice, a plaintiff must present "sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication" (emphasis added)); *cf. Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (in context of interpreting federal statutory law, holding that "it would strain the concept of notice" to conclude that a letter to the defendant two-and-a-half years prior to the credit report at issue, complaining of reporting accuracies, placed the defendant on notice so as to render its subsequent alleged errors "willful").

We have considered County Vanlines' remaining arguments and find them meritless. Accordingly, the order of the District Court is hereby AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Experian asserts the defense that County Van & Storage is in fact an alter ego of County Vanlines, and therefore that its report was truthful. Lucchesi owned the former company, and the District Court found that County Vanlines, which Lucchesi currently owns,

assumed control over County Van & Storage when the person he sold it to defaulted on his payments. In addition to sharing an address and phone numbers, the two companies share some employees, vendors, and customers. The District Court did not, nor do we, reach this defense of Experian's.

n2 We note, as did the District Court, that our understanding of County Vanlines' position was seriously impeded by counsel's failure to adhere to basic conventions of grammar, style, formatting and citation.

01 Civ. 7075 (WCC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

COUNTY VANLINES INC.,
Plaintiff,

- against -

EXPERIAN INFORMATION SOLUTIONS, INC.
a/k/a EXPERIAN, Defendant.

April 30, 2004, Decided

COUNSEL: For Plaintiff: BERNARD RABIN, ESQ., Of Counsel, RABIN & RABIN, Tarrytown, New York.

For Defendant: PATRICK G. BRODERICK, ESQ., Of Counsel, JONES DAY, New York, New York.

JUDGES: William C. Conner, Senior United States District Judge.

OPINIONBY: William C. Conner

OPINION:

OPINION AND ORDER

CONNER, Sr. D.J.:

Plaintiff County Vanlines, Inc. ("CVL") brought this commercial defamation action against defendant Experian Information Solutions, Inc. ("Experian") seeking $ 2,500,000 in compensatory damages and $

5,000,000 in punitive damages.[1] Plaintiff now moves pursuant to *FED. R. CIV. P. 56* for partial summary judgment dismissing defendant's affirmative defense of truth. Defendant cross moves pursuant to *FED. R. CIV. P. 56* for summary judgment dismissing plaintiff's Complaint in its entirety. For the reasons set forth herein, we grant defendant's cross motion for summary judgment, and we deny as moot plaintiff's motion for partial summary judgment.[2]

BACKGROUND

The record, which includes this Court's previous opinions in this case,[3] reveals the following undisputed facts.[4] Plaintiff is a moving and storage business located in Yonkers, New York. (Pl. *Rule 56.1* Stmt. P 1.) In April 2001, plaintiff applied at the Westchester County branch of the Bank of New York (the "bank") for a commercial loan to purchase a 52-foot trailer for its moving business. (*Id.* P 3.) During the subsequent loan approval process, bank officials requested a copy of plaintiff's credit history from defendant, which is a credit reporting agency. (*Id.* P 4.) Defendant erroneously sent to the bank the credit report of a different corporation named County Van & Storage, Inc. ("CV&S"). (*Id.* P 6.) This credit report contained negative credit information about CV&S, all of which predated CVL's 1996 incorporation date. This information included documentation of late bill payments, past-due payments, a written-off unpaid cellular phone/paging account and a tax lien. (*Id.* PP 6-7; Rabin Decl., Ex. 14; Broderick Decl., Ex. R.) Relying on this credit report, the bank denied plaintiff's request for a loan. (Rabin Decl., Ex. 13.) Thereafter, plaintiff commenced this action on June 18, 2001. (Notice of Removal P 2.)

Experian answered the Complaint by asserting, *inter alia*, that the credit report was true. (Ans., 2d Aff. Def.) Thereafter, plaintiff moved pursuant to *FED R. CIV. P. 12(f)* to strike that and other affirmative defenses. *See County Vanlines, 205 F.R.D. at 149.* We denied that motion with respect to the affirmative defense of truth because we concluded that there were issues of fact and law that required resolution, particularly whether plaintiff was the alter ego of *CV&S. Id. at 154.* In so holding, we took judicial notice of Judge Martin's opinion in *NLRB v. County Van & Storage, Inc., 1997 U.S. Dist. LEXIS 7371, No. 97 Civ. 2099, 1997 WL 282212, at *4 (S.D.N.Y. May 28, 1997),* which denied CVL's cross motion for summary judgment on that issue because, although the NLRB had failed to establish "reasonable cause to believe" that CVL was the alter ego of CV&S, the factual record was nevertheless insufficient to prove that they were not the alter ego.[5] *County Vanlines, 205 F.R.D. at 154.* We held that because the NLRB action did not conclusively determine the alter ego status, there were "disputed issues of fact and law as to whether plaintiff was an alter ego of CV&S, and as a consequence, whether the disputed credit report was true" that precluded granting the motion to strike the affirmative defense. *Id.* We also denied plaintiff's motion to strike the affirmative defense of the qualified privilege afforded to credit reporting agencies under New York law, holding that "whether or not defendant acted with [the requisite] gross negligence turns in large part upon unsettled issues of fact." *Id. at 157.*

Discovery having concluded, plaintiff now claims that the affirmative defense of truth fails as a matter of law because defendant has not offered any additional

proof tending to show that CVL is the alter ego of CV&S. (Pl. Mem. Supp. Summ. J. at 6-7.) Defendant contends in response that the record demonstrates the existence of a genuine issue of material fact as to the alter ego/truth defense, and also cross moves for summary judgment on the ground that there is insufficient evidence of gross negligence or malice to overcome the qualified privilege afforded to credit reporting agencies. (Def. Mem. Supp. Cross Mot. Summ. J. at 6, 10.)

The additional undisputed facts adduced during discovery control the disposition of both plaintiff's motion and defendant's cross motion. CV&S was a New York corporation in the business of moving and storage. (Lucchesi Dep. at 8-10.) One hundred percent of the stock of CV&S was owned by Frank Lucchesi, who was the only officer as well. (*Id.* at 9-10.) CV&S was a local agent for Atlas Van Lines, a national moving company. (*Id.* at 13-14.) In 1994, Lucchesi sold CV&S to Bruce Michaels, but Lucchesi remained employed by Michaels in the sales department. (*Id.* at 15, 17.) CV&S subsequently was reincorporated as a Delaware corporation that became known as County Van & Storage of Delaware. (*Id.* at 18.) It continued, however, to do business at the same address. (*Id.* at 18-19.)

Thereafter, in 1996, Michaels failed to make payments on notes issued to Lucchesi. (*Id.* at 23.) Michaels then abandoned the business and Lucchesi foreclosed on the note, after which a corporation owned by Lucchesi known as F.L. Van Associates ("F.L.") took control of CV&S. (*Id.*) F.L. then became known as CVL, with Lucchesi as president. (*Id.* at 25-26.)

Lucchesi testified at his deposition that CVL is located at the same address as CV&S and has the same telephone number used by CV&S. (Lucchesi Dep. at 18-19, 32-33; Def. Rule 56.1 Stmt. PP 5-6, Ex. L.) The two companies also share some of the same employees, vendors and customers. (Lucchesi Dep. at 26-28.) After his 1994 sale of CV&S to Michaels, Lucchesi retained no ownership interest in the company and it had no officers or directors in common with CVL. (*Id.* at 78-79.)

The credit report that gave rise to the present litigation was not the first time that defendant issued a credit report about CVL. In December 1998, plaintiff applied for a loan from Fleet Bank. (Pl. Rule 56.1 Stmt. P 13.) Fleet subsequently requested from defendant credit reports on both CV&S and CVL. (Broderick Decl., Exs. O-P; Poteraj Aff. P 28.) On December 22, 1998, defendant sent to Fleet Bank a report with credit information about both CV&S and CVL.[6] (Pl. Rule 56.1 Stmt. P 13; Broderick Decl., Exs. O-P; Poteraj Aff. P 28.) The CVL report did not contain negative credit information, but the CV&S report contained the same negative credit information that appeared in the April 2001 report at issue in the present case. (Pl. Rule 56.1 Stmt. P 13; Broderick Decl., Exs. O, P, R.) Fleet denied plaintiff's loan application. (Pl. Rule 56.1 Stmt. P 13.) Thereafter, plaintiff requested a reinvestigation and obtained from defendant a credit report on January 14, 1999 referring only to CVL.[7] (Pl. Rule 56.1 Stmt. P 13; Broderick Decl., Ex .Q.) The record does not indicate whether plaintiff reapplied to Fleet for credit after receiving the reinvestigated report.

Brian Poteraj, a technical manager employed in that capacity since 1990 by defendant and its predecessor

TRW, Inc., described the process by which defendant's computer search system retrieves businesses' credit information. (Poteraj Aff. P 1.) Defendant's computer system stores items of credit information from thousands of sources, who include "contributors" such as banks, retailers, finance companies and collection agencies, in addition to the public record. (*Id.* P 3.) Defendant does not originate or create credit information; it only stores information supplied to it. (*Id.*) Defendant maintains credit information on approximately 20 million businesses, and processes over 40 million updates to that information per month. (*Id.* P 4.)

Defendant has developed a process of matching business information with its computer system that is intended to address matching problems caused by, *inter alia*, name changes, address changes, misspelling, misreading and inconsistent identification. (*Id.* P 6.) When contributors provide credit information to defendant, they include certain identifying information. (*Id.* P 7.) This information is collected primarily from lenders' accounts receivable files, and usually includes the "doing business as" name of a business as shown on, for example, signs and letterheads, and not necessarily its corporate legal name that is on file with the secretary of state. (*Id.* P 8.) When a subscriber requests a credit report, that subscriber submits similar information about the subject of the requested report. (*Id.* P 7.)

Defendant does not store information as completed credit reports. (*Id.* P 10.) Rather, when a subscriber requests a credit report, the computer system creates a report by comparing and matching the information provided by the subscriber with information contained

in the system. (*Id.* P 11.) The subscriber obtains the information that it provides to defendant by requesting it from the potential borrower. (*Id.* P 13.) This information includes identifying information that may not be unique to a particular business, such as addresses and similar business names. (*Id.* P 12.) Defendant has no control over the accuracy or completeness of the information provided to it by subscribers or contributors for the generation of reports, including whether the subscriber has correctly identified the potential borrower. (*Id.* P 13.)

The computer system does not require 100 percent matching between information provided and information in the database because that level of precision would eliminate a lot of accurate and relevant data by precluding consideration of identification material that varies even slightly. (*Id.* PP 17-18, 20.) To ensure accuracy in matching, the system's matching system ascribes different weights, obtained from extensive statistical analysis, to a variety of identifying factors. (*Id.* P 19.) If the computer system identifies multiple candidates that match the information provided, defendant sends the match list to the subscriber. (*Id.* P 14.) The subscriber may elect to receive up to five reports from that list, and will only be charged for one report. (*Id.*) Defendant does not keep copies of the reports that it ultimately sends to its subscribers. (*Id.*)

In the present case, Lucchesi completed and signed the loan application with the Bank of New York. (Lucchesi Dep. at 53.) CVL was identified by name on the application form as "County Van Lines," rather than the more accurate "County Vanlines." (Broderick Decl., Ex. L.) Thereafter, when defendant created a credit

report at the bank's request, Poteraj testified that the similarity in name between "County Van Lines" and the former "County Van & Storage," as well as the identical addresses and similar businesses, caused the computer system to provide information on both companies. (Poteraj Aff. PP 22, 24.) Indeed, some companies reporting information to defendant about plaintiff still use the business name "County Van & Storage." (*Id.* P 23.)

The bank then relied on the negative report dated April 4, 2001, in which the business was identified as "County Van & Storage, Inc.," and denied plaintiff's request for a loan on April 20, 2001. (Rabin Decl., Exs. 11-12.) Thereafter, plaintiff obtained from defendant a copy of this report on April 16, 2001, and a subsequent report in July 2001 identifying the company as "County Vanlines, Inc." that did not include the negative information. (Rabin Decl., Exs. 13-15.) Defendant subsequently separated the information linking the two companies, and has not thereafter published any further credit reports that link the two companies. (Poteraj Aff. P 27.)

DISCUSSION

I. Standard of Review

Under *FED. R. CIV. P. 56*, summary judgment may be granted where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See FED. R. CIV. P. 56(c)*. The burden rests on the movant to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. A genuine factual issue exists if there is

sufficient evidence favoring the nonmovant for a reasonable jury to return a verdict in his favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* In deciding whether summary judgment is appropriate, the court resolves all ambiguities and draws all permissible factual inferences against the movant. *See id. at 255.* To defeat summary judgment, the nonmovant must go beyond the pleadings and "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* The court's role at this stage of the litigation is not to decide issues of material fact, but to discern whether any exist. *See Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1224 (2d Cir. 1994).*

II. Whether Defendant's Statements Were Protected By the Qualified Privilege

To establish a prima facie case of defamation, a plaintiff must prove the publication of a false statement that "tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Foster v. Churchill, 87 N.Y.2d 744, 751, 665 N.E.2d 153, 642 N.Y.S.2d 583 (1996)* (citation omitted). A defamation action is for the tort of libel, rather than slander, when the statement at issue is published in written, and not spoken, form. *See, e.g., Albert v. Loksen, 239 F.3d 256, 265 (2d Cir. 2001).* Moreover, even though a statement may be defamatory, "there exists a qualified privilege where the communication is made to persons who have some common interest in the

subject matter." *Foster, 87 N.Y.2d at 751.* Credit investigation and reporting agencies enjoy this qualified privilege and are "not liable for defamation unless the defamatory matter was uttered with malice or such a wanton and reckless disregard of the rights of another as is ill will's equivalent." *Mil-Hall Textile Co. v. Dun & Bradstreet, 160 F. Supp. 778, 780 (S.D.N.Y. 1958); accord A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775, 777 (2d Cir. 1957); see also Weir v. Equifax Servs., Inc., 210 A.D.2d 944, 945, 620 N.Y.S.2d 675 (4th Dep't 1994)* ("It is the very function of the qualified privilege to protect the conduct of a credit investigative reporting company ...."). To survive a motion for summary judgment, a plaintiff has the "the burden of presenting evidence in admissible form sufficient to raise a triable issue whether the statements were made with malice ...." *Weir, 210 A.D.2d at 945; accord Albert, 239 F.3d at 272-73; Liberman v. Gelstein, 80 N.Y.2d 429, 437, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992).*

A plaintiff does not make the requisite showing of malice simply by conclusorily labeling the defamation malicious. *Shamley v. ITT Corp., 869 F.2d 167, 173 (2d Cir. 1989).* A plaintiff must present evidentiary facts which support this conclusion. *Id.; see also Kasachkoff v. City of New York, 107 A.D.2d 130, 135, 485 N.Y.S.2d 992 (1st Dep't 1985), aff'd, 68 N.Y.2d 654, 496 N.E.2d 226, 505 N.Y.S.2d 67 (1986).* "This burden may not be met by 'surmise, conjecture and suspicion' ... nor by 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions ....'" *Id. at 134* (citations omitted) (quoting *Shapiro v. Health Ins. Plan, 7 N.Y.2d 56, 63, 163 N.E.2d 333, 194 N.Y.S.2d 509*

(1959) and *Dano v. Royal Globe Ins. Co., 59 N.Y.2d 827, 829, 451 N.E.2d 488, 464 N.Y.S.2d 741 (1983)).*

The malice requirement is satisfied if the plaintiff presents admissible evidence demonstrating that the statements were made with malice under either the constitutional or the common-law malice standards. *See Albert, 239 F.3d at 272-73*; *Liberman, 80 N.Y.2d at 437*; *Weir, 210 A.D.2d at 945.* Defendant argues that plaintiff has not established a sufficient degree of malice under either standard to overcome the qualified privilege afforded to credit reporting agencies. (Def. Mem. Supp. Cross Mot. Summ. J. at 6.) Plaintiff argues otherwise. We conclude that plaintiff has not made the requisite showing of malice. Beyond conclusorily alleging gross negligence and "ill will's equivalent," plaintiff has not offered any admissible evidence to support its factual allegations and negate defendant's claim of qualified privilege.

A. Common-Law Malice Standard

"Common-law malice 'mean[s] spite or ill will' ... and defeats the privilege only if it is 'the one and only cause for the publication ....'" *Albert, 239 F.3d at 272* (citations omitted) (quoting *Liberman, 80 N.Y.2d at 439*); *see also Weir, 210 A.D.2d at 945.* Plaintiff does not offer any evidence that defendant published the alleged false reports solely out of spite or because of ill will towards plaintiff. Instead, plaintiff contends that defendant has a "condition precedent" of good faith and that "it rests with the person claiming the privilege to show that the case comes within the exception." (Pl. Mem. Opp. Cross Mot. Summ. J. at 4-5, 12.) We find no legal support for this proposition, particularly in the present case wherein it is undisputed that a qualified privilege is

available for credit reporting agencies in the absence of malice.[8]

In any event, plaintiff has not introduced any evidence sufficient to create a triable issue of fact as to whether ill will, assuming its presence, was the *sole* motivating factor for the alleged false publication. Indeed, defendant has proffered uncontradicted evidence showing that the credit report was published because of the numerous similarities between CVL and CV&S, many of which have been acknowledged by plaintiff. (Poteraj Aff. P 24; Def. Rule 56.1 Stmt. PP 4-9; Pl. Rule 56.1 Stmt. PP 4-9.) Accordingly, we conclude that plaintiff has not demonstrated the existence of a triable issue of fact with respect to the presence of common-law malice.

B. Constitutional Malice Standard

Satisfaction of the well established constitutional or actual malice standard first articulated by the United States Supreme Court in *New York Times v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*, will defeat the qualified privilege in a defamation action. *See, e.g., Liberman, 80 N.Y.2d at 437-38*; *Weir, 210 A.D.2d at 945*. Under the *New York Times* standard, a plaintiff need not prove that actual ill will was the sole motivating factor for the publication of the defamatory statement, but "must demonstrate that the 'statements [were] made with [a] high degree of awareness of their probable falsity.' ... In other words, there 'must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Liberman, 80 N.Y.2d at 438* (citations omitted) (quoting *Garrison v. Louisiana, 379 U.S. 64, 74, 13 L. Ed. 2d 125,*

85 S. Ct. 209 (1964) and *St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)*). The defendant must have acted with "reckless disregard" for the truth. *Liberman, 80 N.Y.2d at 439.*

Satisfaction of the constitutional malice standard requires the plaintiff to prove far more than mere mistake or negligence on the part of the defendant. As the New York Court of Appeals has stated, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action." *Id.; see also Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164, 170 (2d Cir. 2003)* (applying this proposition and holding that the defendant-principal's failure to investigate the allegedly false content of the plaintiff-guidance counselor's performance report before he sent it to the schools superintendent did not satisfy the actual malice standard). Thus, "'malice ... means more than mere negligence or want of sound judgment ... It means more than hasty or mistaken action.'" *A.B.C. Needlecraft, 245 F.2d at 777* (omissions in original) (quoting *Pecue v. West, 233 N.Y. 316, 322, 135 N.E. 515 (1922)*).

Our review of the case law of New York demonstrates that under the constitutional malice standard, piercing the qualified privilege in the credit reporting context requires truly egregious and reckless conduct on the part of the credit reporter. Mistakes arising from ordinary negligence will not overcome the qualified privilege. For example, in *Rodrigues v. R.H. Macy & Co., 88 Misc. 2d 985, 391 N.Y.S.2d 44 (Civ. Ct. N.Y. Co. 1977)*, a consumer credit case, the plaintiff ordered a piece of furniture from the defendant. *Id. at 986.* There was a long delay in the delivery and, when

the item was delivered, it did not conform to the plaintiff's specifications. *Id.* The plaintiff decided to return the furniture, resulting in another long delay before the defendant picked it up from the plaintiff's home. *Id.* During this second delay, the defendant reported to a credit bureau that the plaintiff had a delinquent account, a report that was improper because the plaintiff should not have been charged for the furniture. *Id.* During this same delay, the plaintiff, otherwise employed and financially responsible, had a credit card application denied. *Id.* Thereafter, the plaintiff brought an action for slander and breach of contract. *Id.* The court dismissed the slander claim and held that although the defendant "was guilty of negligence, bad management and poor customer relations," it was protected by the qualified privilege because "there was no evidence nor does it appear that this was done with malice or wilful intent to injure." *Id. at 987.*

By contrast, *Nat'l Apparel Adjustment Council, Inc. v. Dun & Bradstreet, Inc., 42 A.D.2d 58, 345 N.Y.S.2d 40 (1st Dep't), appeal denied, 33 N.Y.2d 518, 305 N.E.2d 496, 350 N.Y.S.2d 1025, 305 N.E.2d 496, 350 N.Y.S.2d 1025 (1973),* provides an illustration of the outlandish conduct on the part of a credit bureau that will create liability. In this case, the Appellate Division affirmed the jury's verdict finding the defendant credit bureau liable for libel and slander when it "concededly ... was out to get" the plaintiff and had contacted some of the plaintiff's creditors in contravention of its usual practices, which led the creditors to join in filing an involuntary bankruptcy petition. *Id. at 60.* The defendant also passed along an unsubstantiated rumor that the plaintiff might be leaving the country. *Id. at 61.*

Moreover, "even while the dismissal of the involuntary petition was in progress, [the] defendant's employees kept spreading rumors of voluntary bankruptcy, and [the plaintiff's] principal factor froze his credits. The end result, after an abortive attempt at chapter 11 reorganization to relieve pressure and untimely payment demands, was actual bankruptcy." *Id.* The court concluded that the jury reasonably could have found that the defendant's behavior was "part of a common scheme or plan, deliberately and maliciously set on foot to injure [plaintiff's] business enterprises," and that if the defendant had acted with reckless disregard and not deliberately, it would be "at least as evil, particularly when indulged in by an agency enjoying defendant's reputation and position of trust, as deliberate malice." *Id.*

Decisions in other states provide a similar illustration of the type of egregious conduct, transcending mere negligence, necessary to give rise to liability. *Compare Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 177-78, 345 S.W.2d 34 (1961)* (holding that the defendant was not entitled to the protection of the qualified privilege because there was "substantial evidence" that it exhibited "conscious indifference and reckless disregard" toward the truth and the plaintiff-merchant's rights by publishing a report indicating that the plaintiff was about to file for bankruptcy based solely on a "misunderstood casual remark"), *overruled on other grounds by United Ins. Co. of Am. v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998), with Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896, 900-01, 13 Tex. Sup. Ct. J. 427 (Tex. 1970)* (holding that the defendant credit reporting service was entitled to the protection of the qualified privilege when it erroneously

and negligently reported without verifying that the plaintiff "Alvin *Truman* O'Neil" had filed for bankruptcy, rather than his brother "Alvin *Numan* O'Neil" (emphasis added)).

Defendant argues that plaintiff has not shown any evidence of malice on its part and that it is, therefore, entitled to summary judgment because it is protected by the qualified privilege. (Def. Mem. Supp. Cross Mot. Summ. J. at 8-9.) It contends that any error was the result of an honest mistake occasioned by the computer matching system's linking of CVL and CV&S that was caused by their very similar identifying information, and that there is therefore no showing of actionable malice because it had no awareness of the report's falsity. (*Id.*) In response, plaintiff contends that defendant "lies, misrepresents, and attempts to perpetrate a fraud upon this Court" and appears to argue that defendant acted with reckless disregard for the truth because the report issued to Fleet in December 1998 and the January 1999 reinvestigation put defendant on notice as to the lack of any link between CVL and CV&S.[9] (Pl. Mem. Opp. Cross Mot. Summ. J. at 8-9.) Plaintiff also seems to argue that defendant's matching system is grossly flawed because there is no evidence of any procedures that ensure the accuracy of the computer-generated report when the computer must utilize conflicting or confusing data. (*Id.* at 11-12.) We conclude that the record reveals no evidence of malice on the part of defendant beyond plaintiff's bare and conclusory allegations, and defendant therefore remains entitled to the protection of the qualified privilege.

Plaintiff argues that defendant acted with reckless disregard for the truth because it had notice of the

falsity of the 2001 report as a result of the "linkage" in the December 1998-January 1999 report and reinvestigation. (*Id.* at 8-9.) Our review of the record indicates that plaintiff has offered no evidence that the December 1998 report sent to Fleet *incorrectly* linked CVL and CV&S -- put differently, plaintiff has offered no evidence to dispute defendant's contention that Fleet had requested information about both CVL and CV&S. Thus, the January 1999 credit report limited to CVL and omitting references to CV&S, issued along with the reinvestigation letter, *see supra* note 7, does not establish that defendant erred in responding to Fleet's December 1998 by furnishing reports on both businesses.[10]

Moreover, even assuming without deciding that the Fleet incident did put defendant on notice of the distinction between CVL and CV&S, that incident was too remote temporally from the April 2001 report at issue here to render defendant's actions reckless. Cases arising in the analogous consumer credit reporting context under the Fair Credit Reporting Act ("FCRA") *15 U.S.C. § 1681 et seq,*[11] are illustrative on this point. The FCRA allows an award of punitive damages for a credit bureau's willful noncompliance with *§ 1681e(b)*, which is the provision that requires credit bureaus to maintain "reasonable procedures to assure maximum possible accuracy." *See 15 U.S.C. § 1681n.* A credit bureau's actions committed without "evil motive," but in "conscious disregard for the rights of others" are considered "willful noncompliance" justifying the imposition of punitive damages under the FCRA. *See Cousin v. Trans Union Corp., 246 F.3d 359, 373-74 (5th Cir. 2001); Philbin v. Trans Union Corp., 101 F.3d 957, 970 (3d Cir. 1996); Casella v. Equifax Credit Info.*

Servs., 56 F.3d 469, 476 (2d Cir. 1995), cert. denied, 517 U.S. 1150, 134 L. Ed. 2d 571, 116 S. C 452 (1996).

Under this "willful noncompliance" standard, which echoes the constitutional malice standard linguistically, courts have held that the reappearance of erroneous material on a consumer's credit report, even after the consumer has notified the credit bureau of the error, may be evidence of negligence, but does not constitute conscious disregard justifying the imposition of punitive damages. Thus, in *Cousin*, the Fifth Circuit held that although the credit bureau had notice that a reported delinquency was the result of subscription fraud against the consumer, and previously had shielded the consumer's report from further entries based on the fraudulent account, the reinsertion of that false account information several months after the initial notice did not constitute willful noncompliance. *246 F.3d at 373-74.* Indeed, the court also concluded that with respect to the consumer's state law defamation claim, these facts did not constitute legally sufficient evidence of malice by reckless disregard. Similarly, in *Philbin*, the Third Circuit concluded that a credit bureau's republication of erroneous information two years after it had been removed in response to a complaint by the consumer did not constitute evidence of willful noncompliance. *101 F.3d at 970.* Accordingly, we conclude that even if the December 1998-January 1999 incident had been notice of the lack of linkage between CVL and CV&S, it does not create a triable issue of fact as to whether defendant acted with reckless regard for the truth in issuing the April 2001 credit report.

We similarly reject plaintiff's apparent argument that the lack of procedures and safeguards in the

computer-matching system for ensuring complete accuracy when the computer must process conflicting or confusing data amounts to defendant's reckless disregard for the truth, or knowledge of the statements' probable falsity. (Pl. Mem. Opp. Cross Mot. Summ. J. at 11-12.) Indeed, the Seventh Circuit has held such matching systems compliant as a matter of law under the "reasonable procedures to assure maximum possible accuracy" standard of the FCRA, *15 U.S.C. § 1681e(b)*. *See Crabill v. Trans Union, L.L.C., 259 F.3d 662, 663 (7th Cir. 2001)*. Moreover, this "reasonable procedures" provision allows for the imposition of liability on credit bureaus based on mere negligence; it is, therefore, far less forgiving of credit agencies than is the constitutional malice standard. *See Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994)* (noting that credit agencies may be held liable for actual damages, costs and attorney's fees for negligent violation of *§ 1681e(b)*, and subject to punitive damages for wilful violations); *King v. MTA Bridges & Tunnels, 933 F. Supp. 220, 225 (E.D.N.Y. 1996)* (stating that a plaintiff seeking to prove a violation of *§ 1681e(b)* must demonstrate that "the consumer reporting agency was negligent in that it failed to follow reasonable procedures to assure the accuracy of its credit report," in addition to the reporting of inaccurate information, injury and causation).

Crabill is particularly illuminating. In that case, the plaintiff, a man named Jerry, had a brother named John, and their social security numbers differed only by one digit. *259 F.3d at 663*. This resulted in the defendant credit bureau erroneously furnishing a credit report on John several times when one had been requested on Jerry. *Id.* "Denied credit several times,

Jerry complained to Trans Union, which began adding at the end of its credit reports on Jerry the notation (in capital letters): 'do not confuse with brother John D. Crabill.'" *Id.* Nevertheless, Jerry's creditors continued to receive from the defendant credit bureau unsolicited reports about John, although those reports did contain the cautionary notation. *Id.* This occurred because the credit bureau's computer "treated requests for a credit report on Jerry as requests for a credit report on John as well. If any of these creditors missed the notation and erroneously supposed that both reports pertained to Jerry, the mistake was the creditor's." *Id.* Some creditors, however, continued to decline credit to Jerry, which caused him to bring an action against the credit bureau. The Seventh Circuit concluded that "the statutory duty to maintain reasonable procedures to avoid inaccuracy does not require a credit agency to disregard the possibility that similar files refer to the same person." *Id.* In so holding, it accepted the credit bureau's argument that "two files with similar though not identical identifying data may actually be referring to the same person, the differences in data being the result of errors in data collection or compilation, and so it was useful for creditors to have both Crabills' files and make their own judgment of whether they were different persons."[12] *Id.*

In light of such cases applying a far less stringent reasonableness standard, we conclude that defendant's operation of its computer system did not amount to reckless disregard for the truth. Indeed, there is evidence in the record that a 100 percent matching requirement would be harmful because it would eliminate from consideration relevant credit information based on errata in the database. (Poteraj

Aff. PP 4-5.) Furthermore, the April 2001 Bank of New York credit application submitted and signed by Lucchesi, the president of CVL himself, and plaintiff's counsel, as CVL's vice-president named the business as "*County Van Lines*," not "County Vanlines," a misspelling that renders the terms searched even closer to "County Van & Storage." (Broderick Decl., Ex. L.) Thus, in the context of the credit defamation cases from New York and elsewhere, this case is far closer to the "Truman" and "Numan" confusion of *O'Neil, 456 S.W.2d at 900-01*, or "John" and "Jerry" in the FCRA case *Crabill, 259 F.3d at 663*, than it is to the grossly negligent conduct of the credit bureau in *Robinson* publishing a report of bankruptcy based only on casual gossip, *233 Ark. at 177-78*, or the vindictive, scheming credit bureau in *Nat'l Apparel Adjustment Council, 42 A.D.2d at 60-61*. Accordingly, we conclude that plaintiff has not introduced evidence of malice sufficient to pierce the protection afforded to defendant by the qualified privilege, and we dismiss plaintiff's commercial defamation claims in their entirety.[13]

CONCLUSION

For all of the foregoing reasons, defendant's cross motion for summary judgment dismissing plaintiff's Complaint in its entirety is granted, and plaintiff's motion for partial summary judgment is denied as moot.

SO ORDERED.

Dated: April 30, 2004

William C. Conner

Senior United States District Judge

Footnotes

n1 Plaintiff, a New York corporation with its principal place of business in Yonkers, New York, initially brought this action in the Supreme Court of the State of New York, Westchester County. Defendant is an Ohio corporation with its principal place of business in California and authorized to do business in New York. (Notice of Removal P 1; Complt. P 1; Ans. P 2.) Subsequently, defendant removed the case to this Court. We have jurisdiction pursuant to *28 U.S.C. § § 1332* and *1441*.

n2 *See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck, 236 F. Supp. 2d 349, 351 (S.D.N.Y. 2002)* (Conner, J.) (holding that "plaintiff's motion for partial summary judgment is granted, thereby rendering moot defendant's motion to dismiss.").

n3 This Court has rendered two previous opinions in this case, familiarity with which is assumed. *See County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, No. 01 Civ. 7075 (May 31, 2002) (denying plaintiff's previous motion for summary judgment on liability); *County Vanlines, Inc. v. Experian Info. Solutions, Inc., 205 F.R.D. 148 (S.D.N.Y. 2002)* (granting in part and denying in part plaintiff's motion to strike defendant's affirmative defenses).

n4 In its motion for summary judgment, plaintiff failed to include the required Local Rule 56.1 Statement, but instead attached a "Local Rule 3G statement" from a previous motion in this matter. Local Rule 3G was the predecessor provision of Local *Rule 56.1*. We will assume that plaintiff intended this submission to substitute for its Rule 56.1 Statement, and we will cite

it accordingly. Plaintiff's response to defendant's cross motion includes a properly labeled Rule 56.1 Statement.

n5 In *NLRB v. County Van & Storage, Inc.*, the NLRB brought an action against CV&S and CVL alleging that the companies committed various violations of the *National Labor Relations Act* (the "Act"). 1997 *1997 U.S. Dist. LEXIS 7371, WL 282212, at *1.* The NLRB moved for a preliminary injunction requiring the companies to recognize and bargain in good faith with a union until the matter could be fully litigated before the NLRB. *1997 U.S. Dist. LEXIS 7371, [WL] at *2.* In determining whether the NLRB showed that there was "reasonable cause to believe" that the companies violated the Act, the court stated that "there is no question that the [NLRB] has presented evidence sufficient to show that there is a reasonable cause to believe that [CV&S] violated the Act," but that "the real question ... is whether [CVL] is a disguised continuance or the alter ego of [CV&S] and is, therefore, bound by the bargaining obligations of that corporation." *Id.*

n6 The parties apparently dispute the number of credit reports sent to Fleet by defendant, with plaintiff stating that Fleet received one report that contained credit information concerning both CVL and CV&S, and defendant stating that Fleet received two separate reports - one for each company. (Pl. Rule 56.1 Stmt. P 13; Def. Rule 56.1 Stmt. P 1.) Neither party, however, claims that this discrepancy creates a genuine issue of material fact relevant to the disposition of the present dispute. Indeed, our independent review of the December 1998 credit report reveals that this dispute is largely one of semantics because the report is a single

document, but is clearly divided into two separate sections with separate file numbers, one of which is devoted to CVL and the other to CV&S. (Broderick Decl., Ex. O.)

n7 The January 14, 1999 credit report was accompanied by a form cover letter that read:

> Dear Business Executive:
>
> The enclosed business profile will confirm the results of our reinvestigation regarding the accuracy of credit information reported to Experian Business Solutions, Inc., under the business name and address provided.
>
> If the source which provided the information was unable to verify the information's accuracy, or did not respond to our reinvestigation request, then the information in question was deleted from the file and no longer appears on the report.
>
> If your business was denied credit due to inaccurate information on the Experian report, please provide below the name, address, and fax or telephone number of the business which denied your business credit. Please fax or mail this form to us and we will contact them on your behalf to report the change(s) to your credit report.

(Broderick Decl., Ex. Q.)

n8 Plaintiff's reliance on the qualified privilege principle as articulated in *Byam v. Collins, 111 N.Y. 143, 19 N.E.*

75, 19 N.Y. St. 581 (1888), is misplaced. (Pl. Mem. Opp. Cross Mot. Summ. J. at 12-13.) *Byam* merely states, "The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called 'privileged communications' are exceptions to this rule." *Id. at 150.* Plaintiff, however, does not dispute the existence of a privilege with respect to credit reporting agencies such as defendant. Thus, *Byam* is inapposite because malice is not implied when the qualified privilege is applicable. Indeed, the New York Court of Appeals and the Second Circuit consistently have held that when the privilege applies, the existence of malice is an element that the plaintiff must demonstrate as part of its prima facie case. *See Albert, 239 F.3d at 266* (holding that non-existence of the privilege is an element of defamation); *Shamley, 869 F.2d at 173* ("In order to overcome this privilege, employee-*plaintiffs must allege malice.*" (emphasis added)); *Liberman, 80 N.Y.2d at 437* ("The shield provided by the privilege may be dissolved *if plaintiff can demonstrate* that defendant spoke with malice." (emphasis added)).

n9 We had considerable difficulty comprehending plaintiff's arguments as expressed in its several memoranda. Any misstatement of those arguments herein is the result of the lack of clarity in plaintiff's submissions, aggravated, *inter alia*, by plaintiff's lack of a discernible paragraph or sentence structure, and all-caps, single-spaced point headings, some of which are nearly one page long.

n10 Plaintiff seems to argue that the January 1999 reinvestigation letter, *see supra* note 7, is an admission that the December 1998 report to Fleet was incorrect,

and thus amounted to knowledge by defendant that there was no link between CVL and CV&S. Plaintiff asks hypothetically: "Why would the defendant send the same report on January 19, 1999 saying that after investigation ... they separated or corrected the report." (Pl. Mem. Opp. Cross Mot. Summ. J. at 8.) However, the language of the reinvestigation letter says nothing about separation or correction. *See supra* note 7.

n11 We note, however, that the FCRA is inapplicable in this action because it is applicable only to consumer credit reporting, and not to commercial credit reporting. *See, e.g., Williams v. Equifax Credit Info. Servs., 892 F. Supp. 951, 953 (E.D. Mich. 1995)* (stating that the FCRA "was not enacted to protect consumers in procuring commercial credit, in that it only pertains to consumer credit.").

n12 In *Crabill*, however, the Seventh Circuit ultimately concluded that there was a question of fact as to the reasonableness of the credit bureau's procedure because Jerry's complaint had given it notice of the confusing effect of the multiple reports, and the "ensemble [of reports on John and Jerry] was potentially misleading." *259 F.3d at 664*. The court also concluded, however, that Jerry had not proven that the reports caused him any compensable injuries. *Id.*

n13 Plaintiff, relying primarily on *State Farm Mut. Auto. Ins. Co. v. Bockhorst, 453 F.2d 533 (10th Cir. 1972)*, also argues that a company that utilizes a computer to assemble credit reports is held to a higher standard and cannot claim that an erroneous report is an "honest mistake." (Pl. Mem. Opp. Cross Mot. Summ. J. at 11-12.) We do not read *Bockhorst* as supporting plaintiff's argument in any way - indeed, to begin with,

it is not a defamation case. In *Bockhorst*, an insurance company argued that an insured was not covered for an automobile accident because it had reissued a lapsed policy solely based on the operation of its computer system having processed a payment, and without knowledge of the insured's accident that had occurred shortly before the payment and reissuance. *453 F.2d at 535-36.* The Tenth Circuit rejected that argument, and stated:

> Holding a company responsible for the actions of its computer does not exhibit a distaste for modern business practices as State Farm asserts. A computer operates only in accordance with the information and directions supplied by its human programmers. If the computer does not think like a man, it is man's fault. The reinstatement of Bockhorst's policy was the direct result of the errors and oversights of State Farm's human agents and employees. The fact that the actual processing of the policy was carried out by an unimaginative mechanical device can have no effect on the company's responsibilities for those errors and oversights.

Id. at 536-37. Thus, in the present case, the computer-matching system merely is a tool that defendant uses in its work. Its use does not alter in any way the legal standards applicable to defendant, be they imposed by statute, common law or constitution. Indeed, in the present case, we follow the common sense-imposed lead of other courts considering credit defamation and FCRA claims, and focus our inquiry on the defendant's programming of the computer, and the quality of the data supplied by persons for entry into that computer

system at various points in the credit investigation process. Thus, we reject as fundamentally unsound any contention that defendants who operate computers in their work cannot raise defenses of an "honest mistake" in their work.

(3/31/05)
No. 04-2982-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY VANLINES, INC.,
Plaintiff-Appellant,

-v.-

EXPERIAN INFORMATION SOLUTIONS, INC.,
also known as Experian,
Defendant-Appellee.

JUDGES: PRESENT: HON. RALPH K. WINTER, HON. CHESTER J. STRAUB, HON. REENA RAGGI, Circuit Judges.

A petition for panel rehearing having been filed herein by the appellant County Vanlines. Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

2

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SUPREME COURT, U.S.

No. 05-1660

IN THE

Supreme Court of the United States

COUNTY VANLINES, INC.,

Petitioner,

v.

EXPERIAN INFORMATION SOLUTIONS, INC., ALSO KNOWN AS EXPERIAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Second Circuit apply the correct standard under New York State law for determining whether Petitioner had overcome Respondent's state-law qualified privilege in a commercial defamation action?

2. Under the facts of this case, did Respondent commit defamation?

3. Was Petitioner deprived of due process by the Second Circuit's alleged application of the wrong qualified privilege standard under New York law?

PARTIES TO THE PROCEEDING

The Petitioner, appellant in the Court of Appeals, is County Vanlines, Inc.

The Respondent, appellee in the Court of Appeals, is Experian Information Solutions, Inc. ("Experian"), an Ohio corporation with its principal place of business in Costa Mesa, California. Experian certifies that GUS plc, a company publicly traded on the London Stock Exchange, is the ultimate owner of 100% of Experian.

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RESPONDENT'S BRIEF IN OPPOSITION

This case is a state-law commercial defamation action (removed to federal court on diversity grounds) brought by Petitioner, a moving and storage business, against Respondent, a credit reporting agency. Petitioner claims that Respondent defamed it by publishing a credit report that included information about both Respondent and a predecessor company with a nearly identical name that operated at the same address. The district court granted summary judgment for Respondent—and the Second Circuit affirmed—on the ground that Petitioner had failed to produce evidence of "malice" sufficient to overcome the qualified privilege to which credit reporting agencies are entitled under New York law. Pet. App. 3a-4a, 14a-26a.

Petitioner's argument for certiorari is that the lower courts erred by allegedly applying the wrong standard for overcoming Respondent's qualified privilege under New York law. Those courts interpreted New York law (correctly) as requiring a plaintiff seeking to overcome a qualified privilege to show either "common-law malice" (*i.e.*, spite or ill will) or "constitutional malice," *i.e.*, the *New York Times v. Sullivan*, 376 U.S. 254 (1964), standard developed in public-figure defamation cases. Pet. App. 3a-4a. Petitioner argues that instead of interpreting New York law as borrowing the *Sullivan* standard as a way of judging qualified privilege claims, the lower courts should have interpreted New York law as borrowing from federal law the easier-to-overcome standard of fault applicable in private-figure defamation cases. Pet. 6-14. What Petitioner fails to recognize is that its objection to the ruling below does not concern any issue of federal law—Petitioner is merely challenging the Second Circuit's holding as to what a

plaintiff must show under *New York* law to overcome a defense of qualified privilege. This raises no issue meriting this Court's attention.

STATEMENT

In April 2001, Petitioner County Vanlines ("CVL"), a moving and storage business, applied for a loan from the Westchester County branch of the Bank of New York. As part of the loan approval process, the bank requested a copy of Petitioner's credit report from Respondent Experian, a credit reporting agency. Experian's report included information on both Petitioner and another company, County Van and Storage ("CVS"), based on the similarity between the companies' names (exacerbated by Petitioner's erroneous three-word listing of its own name as "County Van Lines") and the fact that the two companies shared the same address and telephone number. Pet. App. 2a-3a. The names were linked by Experian's computer system, which constructs credit reports using a program that identifies companies based on similarity of data. *Id.* at 3a.

After the bank denied Petitioner's loan application, Petitioner sued in state court for defamation, alleging that the linkage with CVS was defamatory in light of certain negative credit history that applied to CVS, including late payments and a tax lien. After the case was removed to the U.S. District Court for the Southern District of New York, the district court granted summary judgment for Respondent, on the ground that Respondent was entitled to a qualified privilege under New York law that could be overcome only by a showing of common-law or constitutional malice. Pet. App. 14a-16a. The court explained that there was no

evidence of common-law malice, and that under "the case law of New York," constitutional malice sufficient to "pierc[e] the qualified privilege in the credit reporting context" required "reckless conduct on the part of the credit reporter. Mistakes arising from ordinary negligence will not overcome the qualified privilege."*Id.* at 18a. Because Petitioner had failed to create "a triable issue of fact as to whether defendant acted with reckless regard for the truth in issuing the April 2001 credit report," *id.* at 23a, Respondent was entitled to summary judgment.

On appeal by Petitioner, the Second Circuit affirmed. The court began by noting that "[i]t is undisputed that credit reporters enjoy qualified immunity from defamation actions and that therefore County Vanlines would need to show common-law or constitutional malice to prevail." Pet. App. 3a (citing *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957)). After observing that there was "no evidence" of the spite or ill will necessary to establish common-law malice, the court held that Petitioner had failed to produce "any evidence that Experian issued its report recklessly, *i.e.*, 'with [a] high degree of awareness of [its] probable falsity,' so as to meet the constitutional malice standard." Pet. App. 3a-4a (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Accordingly, the Second Circuit held, Petitioner could not overcome the qualified privilege provided to Respondent by New York law.

REASONS FOR DENYING THE PETITION

Petitioner seeks certiorari based on the argument that the decision below conflicts with this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and

Dun & Bradtreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). Petitioner apparently sees a conflict between the Second Circuit's ruling and the holdings in *Gertz* and *Greenmoss* that the First Amendment does not require a plaintiff to show "actual malice" before recovering in a defamation case.

This argument fundamentally misunderstands the decision below. That decision was not based on any holding about what the First Amendment required Petitioner to show. Rather, Petitioner's claim failed because *New York law* required Petitioner to show malice (either common-law malice or constitutional malice). *See, e.g.*, Pet. App. 14a-20a (describing showing of malice required to overcome qualified privilege granted credit reporting agency by New York law); *Liberman v. Gelstein*, 80 N.Y.2d 429, 438-39 (1992) (explaining that under New York law qualified privilege can only be overcome by showing of common-law malice or *New York Times v. Sullivan* "actual malice"). Needless to say, neither *Gertz* nor *Greenmoss* holds that a State may not require a plaintiff to demonstrate actual malice to overcome a state-law qualified privilege. Accordingly, there is no conflict between the decision below—applying an actual malice standard as a matter of state law—and this Court's cases.

Moreover, to the extent Petitioner is arguing that the Second Circuit misinterpreted New York law—*i.e.*, that the Second Circuit should have concluded that New York law called for application of some lower standard than actual malice, *see* Pet. 11-12—that state-law

argument (in addition to being incorrect [1]) plainly presents no issue appropriate for this Court to address.

Furthermore, Petitioner's argument that the courts below incorrectly assessed the evidence in the summary judgment record, Pet. 14, is precisely the type of fact-bound, record-intensive question that this Court routinely and appropriately declines to review.

Finally, Petitioner argues that it was denied due process by the lower courts' assessment of the evidence and the alleged conflict with this Court's decision in *Gertz*, Pet. 16-18, but this argument is merely a repackaging of Petitioner's meritless and fact-bound arguments discussed above, and presents no legitimate issue for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

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[1] Petitioner argues for application of the standard of *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975), which sets forth the general standard for liability under New York law in a defamation case involving a non-public-figure plaintiff. However, *Chapadeau* does not concern the issue in this case, which is not the *general* standard of liability in a defamation case but rather the standard for overcoming a qualified privilege.

Supreme Court, U.S.
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No. 05-1660

IN THE

Supreme Court of the United States

COUNTY VANLINES, INC., PETITIONER

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,
ALSO KNOWN AS EXPERIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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2. The Statement portion of the Response continues to show the continued attempt to mislead the reader as to the significance of major facts. 2

3. The Respondent failed to state any substantive reasons for denying this Petition.This Court should define the meaning of the *Gertz* case followed by the Highest Court of A State, New York, setting forth a standard in compliance with this Court's directive making the *Chapadeau* Standard the law of New York. 3

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. The Respondent uses the ABC Needlecraft v Dun and Bradstreet case to support its position when in fact it only indicates that the Petitioner was truly denied its right to a jury.

The respondent on page 3 states "The court [Second Circuit] began by noting that "it is undisputed that credit reporters enjoy qualified immunity from defamation actions and that therefore County Vanlines would need to show common-law or constitutional malice to prevail." Pet. App. 3a (citing *A.B.C. Needlecraaft Co., V Dun & Bradstreet Inc.* 245 F2.d 775, 777 (2d Cir. 1957". First this case was decided prior to *Gertz.* But more of an indictment is the purported decision of the court in *Needlecraft.* Judge Stewart delivering the opinion stated, "But we cannot agree that the evidence was insufficient to entitle a jury to find that the privilege was destroyed under the circumstances disclosed. While there was not proof that the appellant was activated by ill will or knew that the statement was false when made, the 'malice' required to destroy the privilege does not alone mean actual malice, as the appellant recognizes and as this court in two recent decisions has had occasion to point out. *De Ronda v. Gaytime Shops*, 2 Cir.. 1957 239 F.2d 735, 738;*Stephens v. Columbia Pictures Corporation*, 2 Cir., 1957, 540 F.2d 764, 767. Under the law of New York the malice necessary to destroy a qualified privilege can also consist of 'such a wanton and reckless disregard of the rights of another as is ill will's equivalent.' *Pescue v West*, 1922, 233 N.Y. 316,322, 135 N.E. 515,517. The court continued and said. "Whether the proof showed

such constructive malice was a question of fact to be submitted to the jury." The *Needlecraft* case involved words spoken between two individuals that were then transcribed erroneously into the credit report. It is also important to note, that New York law does not give a qualified immunity to "credit reporters"(response page 3) but gives a credit report a conditional qualified privilege as a result of the common interest doctrine.

2. The Statement portion of the Response continues to show the continued attempt to mislead the reader as to the significance of major facts.

The Statement made by the Respondent on page two of its response, is a continued effort to confuse the issue, the reference is made to "shared same address and telephone number" by CVL and the defunct CV&S of Delaware. Notwithstanding that at the time of the publication of the false and defamatory credit report of April 16, 2001 it was almost five years since the death of County Van and Storage Co., of Delaware. This is only one fact, the maintenance of the files of the defunct business that did not have one single transaction since August, 1996 and the same file number for the defunct business appearing in all three of the defamatory reports and the inconsistent false data contained in the three reports was more than sufficient evidence to allow the jury to make its determination of "Whether the proof showed such constructive malice" as stated by the Court in the *Needlecraft* case". But by using the literal interpretation of ill will and state of mind, both lower courts permitted these subjective standards to produce an illogical and impossible situation for Petitioner to overcome. Even this response of

Respondent fails to attempt to point out any review, investigation, or research of the false defamatory material prior to publication performed by Respondent.

3. **The Respondent failed to state any substantive reasons for denying this Petition.This Court should define the meaning of the *Gertz* case followed by the Highest Court of A State, New York, setting forth a standard in compliance with this Court's directive making the *Chapadeau* Standard the law of New York.**

The Respondent stated its reasons for denying the petition on page 4 and 5 of its response. It is unfortunate that the Respondent relegated the *Chapadeau* case to only a footnote in its response (page 5). Considering that that case is the decision of New York's highest court, set the basis for a standard directed by this Court in *Gertz*, and has to its credit more than 450 citations from cases and leading legal authorities. In contrast is the respondent's reliance upon *Liberman and Gelstein* (page 4) which has only been cited three times, is a libel case dealing with words spoken between two individuals, and the case primarily dealt with deciding if a privilege existed, if the crime involved was serious enough to qualify for per se designation and does not agree with the *Konifoff* case (*Konikoff v Prudential Insurance Co of America 234 F. 3rd 92 (2nd Cir 2000)* . The *Konikoff* case said, **"In *Gertz*, decided some ten years after *Sullivan*, the Supreme Court turned to the question of what standard the First Amendment required private defamation plaintiffs to meet in defamation cases. The Court held, *inter alia*, "that, so long as they do not impose liability without**

fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." the court continued and said, "The vast majority of states subsequently decided that the "appropriate standard of liability" left for them to decide by *Gertz* is negligence". Finally the *Konikoff* court then stated what the highest court of NY set as the new standard for New York as directed by *Gertz*, "the party defamed may recover" if he or she can establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties". *Chapadeau* did not pick a lesser standard, it chose what was a celebration of the *Gertz* decision recognizing that the states had a stake in this issue and directed the states to satisfy their interest in the matter of an individual's right to be protected against the abuse of the written word and in respect of the right of such publication. *Konikoff* clearly points out that New York applies the *Chapadeau Standard* to non media defendants and whenever there is a privileged person, communication, or media involved. It is inconceivable that the Respondent believes that the media or privileged public individual is entitled to less protection than a privilege resulting from a common interest, and no New York case allows absolute ill will, or malice. Further, New York cases require clean hands relating to a disseminated defamatory report and such a report that is published with no research, investigation, or review, cannot be considered to have been disseminated with clean hands.

In summary it is clear. That previously a jurist had to decide whether the common law standard or the constitutional standard applied in overcoming a qualified privilege with all of the numerous sub-standards that were in consideration. The *Gertz* and *Chapadeau* cases changed that. In New York whenever there is a privileged communication, individual or media involved, the *Chapadeau* standard shall apply. No court or jurist shall overcome the federal law of the land as set by this court in *Gertz*, or the law set by the Highest Court of Any State in compliance with this court's directive, by taking upon themselves a search for any other standard due to any personal desires or mental vanity.

CONCLUSION

For the reasons stated in the Petition and herein, Petitioner respectfully requests that this Court grant a Writ of Certiorari and other relief requested in the Petition.

Respectfully submitted,
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